9772.

SUPREME COURT OF THE UNITED STATES.

No. 206.

HENRY MILLER, PLAINTIFF IN ERROR,

vs.

DAVID AUSTIN, WILLIAM S. WILMERDING, & DAVID AUSTIN, Jr.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE DISTRICT OF OHIO.

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Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the honorable the judges of the circuit court of the United States, for the district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court before you, between David Austin, William S. Wilmerding, and David Austin, jr., plaintiffs and Henry Miller, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this thirty-first day of October, in the year of our Lord one thousand eight hundred and fifty, and of the independence of the United States of America the 75th.

Attest: WM. MINER, *Clerk.*

THE UNITED STATES OF AMERICA,
District of Ohio, ss.

I, William Miner, clerk of the circuit court of the United States, for the district of Ohio, do hereby certify, that a true copy of the within writ of error was lodged in my office, on the thirty-first day of October, in the year of our Lord one thousand eight hundred and fifty.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at the city of Columbus, the day and year above written. [L. S.]

WM. MINER, *Clerk.*

THE UNITED STATES OF AMERICA.

Supreme Court of the United States, to David Austin, William S. Wilmerding, and David Austin, jr., greeting:

Whereas Henry Miller has obtained the allowance of our writ of error to the circuit court of the United States, for the district of Ohio,

directed to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, proceedings and judgment in an action of assumpsit, wherein you, the said David Austin, William S. Wilmerding, and David Austin, jr., in that action lately recovered against the said Henry Miller the sum of two thousand four hundred sixty-eight dollars and eighty-six cents damages, and $38\frac{8}{100}$ costs, as by the said record in the said circuit court remaining appears; in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Henry Miller we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be. You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable Roger B. Taney, chief justice of the United States of America, this 31st day of October, in the year of our Lord one thousand eight hundred and fifty, and of the independence of the United States of America the 75th.

JOHN McLEAN.

We acknowledge service of this writ, for and on behalf of the defendants in error, Austin, Wilmerding and Austin, November 19, 1850.

CHASE & BALL,
Attorneys for defendants in error.

Pleas began and held at the court-house, in the city of Columbus, on the third Tuesday in the month of October, that being the fifteenth day of that month, in the year of our Lord one thousand eight hundred and fifty, and of the independence of the United States of America the seventy-fifth, before the honorable John McLean and the honorable Humphrey H. Leavitt, judges of the circui tcourt of the United States, within and for the district of Ohio.

Among other proceedings had were the following, to wit:

DAVID AUSTIN, William S. Wilmerding, and David Austin, jr., partners, &c., plaintiffs,
vs.
HENRY MILLER, defendant.
} In assumpsit.

Be it remembered that heretofore, to wit, on the twenty-eighth day of July, being at the July term of said court, in the year of our Lord one thousand eight hundred and forty-seven, came the said plaintiffs, by their attorneys, and sued out of said court a certain writ of summons ad respondendum, against the said defendant, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Ohio, ss.

To the marshal of said district, greeting:

We command you to summon Henry Miller, citizen of, and resident in, the State of Ohio, if he be found in your bailiwick, to be and appear before the judges of the circuit court of the United States, for the district of Ohio aforesaid, at Columbus, forthwith to answer David Austin, William S. Wilmerding, and David Austin, jr., partners under the firm of Austin, Wilmerding & Co., citizens of and residents in the State of New York, of a plea of assumpsit, damages three thousand (3,000) dollars, and have then there this writ.

Witness the honorable Roger B. Taney, chief justice of the United States, this 28th day of July, 1847, and in the 72d year of [SEAL.] the independence of the United States of America.

Attest: WM. MINER, *Clerk*.

On which said writ are the following endorsements, to wit:

Suit brought against defendant as endorser of a note for $1,500, made by the Mississippi Union Bank, and payable to defendant, or order, in 12 months from 1st May, 1839, and interest; also as maker of a bill of exchange on said Mississippi Union Bank; also for money had and received, money paid, money lent, &c.

CHASE & BALL, *Atty's for pl'ffs*.

I acknowledge myself security for all costs for which the plaintiffs may be liable in this suit.

CHASE & BALL.

And afterwards, to wit, at the July term of said court last mentioned, came the marshal, to whom said writ was in form aforesaid directed, and returned the same into court here, with his proceedings endorsed thereon in the words and figures following, to wit:

Personally served on the defendant an attested copy of this writ, on the 30th day of July, A. D. 1847.

D. A. ROBERTSON, *Marshal, O. D.*
By D. R. GOODIN, *Deputy*.

And afterwards, to wit, on the twelfth day of August, being in the year and at the term of said court last mentioned, came the said plaintiffs, by their attorneys, and filed in said court their declaration in this cause, in the words and figures following, to wit:

Circuit court of the United States, for the seventh circuit and district of Ohio.—July term, A. D. 1847.

DISTRICT OF OHIO, *ss.*

David Austin, William S. Wilmerding, and David Austin, jr., who are citizens of, and residents in, the State of New York, partners under the firm of Austin, Wilmerding & Co., complain of Henry Miller,

who is a citizen of, and resident in, the State of Ohio, in a plea of assumpsit; for that whereas, heretofore, to wit, on the eighth day of February, 1840, at Jackson, in the State of Mississippi, to wit, at the district aforesaid, the Mississippi Union Bank, by William P. Grayson, cashier, made their certain promissory note in writing of that date, and delivered the same to the defendant, and thereby then and there promised to pay to the order of said defendant fifteen hundred dollars, in twelve months from 1st May, 1839, with five per cent. interest till due, which period has now elapsed; and the said defendant then and there endorsed and delivered the same to one George Lockwood, who is a citizen of, and resident in, the State of New York, and the said Lockwood then and there endorsed and delivered the same to the said plaintiffs, of which the said defendant had then and there due notice; and the said Mississippi Union Bank did not pay the same when it became due, although the same was presented to them at their office in Jackson, aforesaid, on the day when the same became due, and payment was then and there demanded; of all which the said defendant had due notice; and afterwards, to wit, on the first day of June, A. D. 1847, in consideration of the premises, promised to pay the said sum of money to the said plaintiffs on request.

And whereas, also, heretofore, to wit, on the eighth day of February, 1840, at Cincinnati, in the State of Ohio, to wit, at the district aforesaid, the said defendant made his bill of exchange in writing, of that date, and directed the same to the Mississippi Union Bank at Jackson, aforesaid, and thereby required the said Mississippi Union Bank to pay to one George Lockwood, who is a citizen of, and resident in, the State of New York, or order, fifteen hundred dollars, in twelve months from 1st May, 1839, with five per cent. interest till due, which period has now elapsed; and the said Lockwood then and there endorsed and delivered the said bill to the plaintiffs, of which the defendant then and there had due notice; and the said Mississippi Union Bank did not pay the said bill when it became due, although the same was presented to them at their office in Jackson, aforesaid, on the day when the same became due, and payment thereof was then and there demanded; of all which the said defendant had due notice; and afterwards, to wit, on the first day of June, 1847, in consideration of the premises, promised to pay the said sum of money to the said plaintiffs on request.

And whereas, also, heretofore, to wit, on the first day of June, 1847, at the district aforesaid, the said defendant was indebted to the said plaintiffs in the sum of two thousand five hundred dollars for money then and there lent and advanced by the said plaintiffs to the said defendant at his request; and in the sum of two thousand five hundred dollars, for money then and there paid, laid out, and expended by the said plaintiffs for the use of the said defendant at his request; and in the sum of two thousand five hundred dollars, for money then and there had and received by the said defendant for the use of the said plaintiffs; and in the sum of two thousand five hundred dollars, for money found to be due from the said defendant to the said plaintiffs

on an account then and there stated between them; and the said defendant afterwards, on the day and year last aforesaid, at the district aforesaid, in consideration of the premises, respectively promised the said plaintiffs to pay them the said several moneys herein above mentioned, on request; yet the defendant has disregarded his said promises and has not paid any of the said moneys, or any part thereof, to the damage of the plaintiffs of three thousand dollars, and therefore he brings his suit, &c., by Chase & Ball, his attorneys.

And afterwards, to wit, on the sixteenth day of August, being at the July term of said court, in the year of our Lord one thousand eight hundred and forty-seven, came the said defendant, by his attorney, and filed in said court his plea to the foregoing declaration, in the words and figures following, to wit:

SEVENTH CIRCUIT COURT OF THE UNITED STATES,
Ohio district.

HENRY MILLER
advs.
AUSTEN, WILMERDING & Co.

And the said defendant, Henry Miller, by Charles Fox, his attorney, comes and defends the wrong, &c., when, &c., and for plea says, he did not undertake and promise in manner and form as the plaintiffs in declaring have alleged, and of this he puts himself upon the country; and the plaintiffs do likewise.

CHARLES FOX,
Attorney for Defendant.

And thereupon this cause was continued.

And afterwards, to wit, at the November term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and forty-eight, this cause was continued.

And afterwards, to wit, at the November term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, at the time appointed by law for holding the July term of said court, in the year of our Lord eighteen hundred and forty-nine, the marshal of said district, in conformity with the requirements of an order to that effect, from the Hon. John McLean, one of the judges of said circuit court, adjourned said court to the fifteenth day of October, then next ensuing; whereupon, by reason of such adjournment, this cause was continued.

And afterwards, to wit, at the October term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, at the November term of said court, in year last aforesaid, this cause was continued.

And afterwards, to wit, at the time appointed by law for holding the

July term of said court, in the year of our Lord eighteen hundred and fifty, the marshal of said district, in conformity with the requirements of an order to that effect from the honorable John McLean, one of the judges of said circuit court, adjourned said court to the thirtieth day of September, then next ensuing; whereupon, by reason of such adjournment, this cause was continued.

And afterwards, to wit, at the September term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, on the *on the* twenty-third day of October, being at the October term of said court, in the year last aforesaid, came the parties, by their attorneys, and thereupon came a jury, to wit:

Mahlon M. Caffer, Adam Peters, Washington W. Conklin, Shelden Clark, William Cooper, O. H. Moeller, Henry Reed, William Domigan, Samuel E. Hibben, Tunis Peters, Samuel McClelland, and John Gabriel, who were duly empannelled and sworn the truth to speak upon the issue joined between the parties, but the investigation of this cause not being completed, the court adjourned the jury until to-morrow morning at 8 o'clock.

And afterwards, to wit, on the twenty-fourth day of October, in the year and at the term of said court last aforesaid, came again the parties aforesaid, by their attorneys, and also the jurors aforesaid; and thereupon the jury upon their oaths do say, that the said defendant did assume and promise in manner and form as the said plaintiffs have complained against him, and assess the damages of the plaintiffs, by reason of the premises, to two thousand four hundred and sixty-eight dollars and eighty-six cents.

And thereupon came the defendant, by his attorney, and moved the court to set aside said verdict, and grant him a new trial.

And now, at this day, to wit, on the twenty-fifth day of October, in the year and at the term of said court first herein mentioned, this cause came on to be heard this day upon the motion of the defendant to set aside the verdict rendered herein on yesterday, and for a new trial, and was argued by counsel.

On consideration whereof, it is ordered, that said motion be overruled; whereupon, it is considered, that the said plaintiffs recover of the said defendant the said sum of two thousand four hundred and sixty-eight dollars and eighty-six cents, their damages by the jurors aforesaid assessed, and also their costs herein expended, taxed to $38 59.

And thereupon the said defendant, by his attorney, tendered a bill of exceptions to the opinion of the court, upon the points set forth in said bill of exceptions, and prays that the same may be signed and enrolled, and made a part of the record in this cause, which is accordingly done, and is in the words and figures following, to wit:

Seventh circuit court of the United States, October term, A. D. 1850.

DAVID AUSTIN, William S. Wilmerding, et al.,
vs.
HENRY MILLER.

Be it remembered, that on the trial of this cause, the plaintiffs in

support of their action offered in evidence the certificate of deposite, purporting to be issued by the Mississippi Union Bank, dated 8th February, 1840, signed W. P. Grayson, cashier, for $1,500, a copy of which is as follows, marked A:

MISSISSIPPI UNION BANK,
No. 959. *Jackson, Miss., Feb.* 8, 1840.

I hereby certify, that Hugh Short has deposited in this bank, payable 12 months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate.

$1,500. WILLIAM P. GRAYSON, *Cashier.*

Registered number nine hundred and fifty-nine.

W. H. WILKINSON, *Teller.*

Fifteen hundred dollars.

(Endorsed.) Pay George Lockwood, or order.

HENRY MILLER,
Cincinnati, Ohio.

A. Pay Austin, Wilmerding & Co., or order, without recourse, &c.

GEORGE LOCKWOOD.

Also the original protest, dated 4th May, 1840, signed L. V. Dixon, ex officio notary public; a copy of which is as follows, marked B:

B. UNITED STATES OF AMERICA,
State of Mississippi, Hinds county.

By this public instrument of protest, be it remembered, that on the fourth day of May, 1840, at the request of Robert T. Haws, the holder of the original certificate of deposite, a true copy whereof is hereto affixed, I, L. V. Dixon, a justice of the peace, acting as notary public ex officio, residing in the city of Jackson, qualified according to law, with said certificate in my possession, went to the office of the Mississippi Union Bank, at Jackson, presented and demanded of the teller thereof payment of the said certificate of deposite, which was by him refused.

Whereupon I, the said justice, acting as aforesaid, do hereby publicly and solemnly protest the said certificate of deposite, as well against the drawer thereof as against the acceptors and endorsers, and all who are or may be concerned therein for all exchanges, re-exchanges, costs, charges, damages, and interests, suffered or to suffer, for the non-payment of said certificate of deposite.

[SEAL.] Thus solemnly done and protested. Given under my hand and seal of office, at Jackson, the day and year first above written.

L. V. DIXON, *J. P.*,
Ex officio notary public.

No. 959.

MISSISSIPPI UNION BANK,
Jackson, (*Miss.*) *Feb.* 8, 1840.

I hereby certify, that Hugh Short has deposited in this bank, payable 12 months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate.

$1500.

WM. P. GRAYSON, *Cashier*.

Also the deposition of said L. V. Dixon, marked C.

Circuit court, United States, seventh circuit and district of Ohio.

DAVID AUSTEN et al.
vs.
HENRY MILLER. } Trespass on the case.

It is agreed that the depositions of L. V. Dixon, esq., and , esq., may be taken before a justice of the peace, or judge of Mississippi, at the convenience of the parties, upon the following direct and cross interrogatories, to be used on the trial of this cause; proof of the official character of the officer taken, save his own certificate, and all exceptions as to time and place waived.

CHASE & BALL, *for Plffs.*
CHAS. FOX, *att'y for Defts.*

Cincinnati, 18th Oct., 1847.

Direct interrogatories to be propounded to L. V. Dixon, esq.

First. Please state whether you resided in Hindes county, in the State of Mississippi, in the year 1840. If yea, state whether you officiated as notary public during that year, and by what authority.

Second. Please state whether you protested a promissory note or certificate of deposite, of which the following is a copy:

MISSISSIPPI UNION BANK,
Jackson, (*Miss.*,) *Feb.* 8, 1840.

No. 939.—I hereby certify, that Hugh Short has deposited in this bank, payable in 12 months from the 1st of May, 1839, with 5 per cent. interest, till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate.

WM. P. GRAYSON, *Cashier*."

$1500.—Endorsed, "Pay George Lockwood or order. Henry Miller." "Pay R. T. Howe or order. George Lockwood, R. T. Howe." If yea, state whether you presented the same and demanded payment for the holder thereof; if yea, state on what day, at what place, of what person, and all the circumstances attending such presentment and demand.

Third. Please state whether any notice of said presentment, demand,

and refusal was made by you, and served on or mailed to the endorsers, or either of them; if yea, state who were notified, and the time and manner of such notification.

Direct interrogatories to be propounded to Geo. L. Potter, esq.

First. Please state whether you are a practising lawyer in the State of Mississippi; if yea, how long have you been such practising lawyer?

Second. Please state whether by the law of said State justices of the peace are ex officio notaries public; if yea, state when such law took effect, and whether it was in force during the year 1840.

Interrogatories to be propounded to the witnesses on behalf of the defendant.

1st. If you say you presented the certificate in question to the Mississippi Union Bank at Jackson, Mississippi, for payment, state what time in the day you presented it; was it before or after the close of banking hours; state whether payment was offered you in any kind of money or bank paper, and what was said about what money or paper was received on deposite, for which the certificate was given; state from whom you received the certificate, and at what time of the day, and on what day, and where did you receive it; had you the original certificate at the time of presentment; do you know who then owned the certificate, who claimed to own it; state what office you held at the time; did you make the demand personally or by deputy?

2d. If you say you gave notice to Henry Miller, the endorser of the certificate, state when and how you gave such notice; was it in writing; if yea, attach a copy of such notice; if you have not a copy, state what was in the notice as near as you can; did you give the notice personally or by mail; if by mail, when, and in what post office did you deposite the notice; was the notice to Miller mailed by itself, or was it remitted in an envelope; if in the latter way, to whom was the envelope directed, and at what place, and if directed to Henry Miller and not forwarded in an envelope to others, to what place was it directed; who signed the notice, and when did you place it in the post office?

CHAS. FOX, *Att'y for defi.*

Circuit court United States, seventh circuit and district of Ohio.

DAVID AUSTEN et al.
vs.
HENRY MILLER.

Depositions of sundry witnesses taken before me, a justice of the peace within the county of Hindes, in the State of Mississippi, on the 11th of November, A. D. 1847, between the hours of 1 and 5 o'clock, p. m., at the chancery court-room for the State of Mississippi, pursuant to the annexed direct and cross interrogatories, to be read in behalf of the plaintiffs in the circuit court above stated, for the district of Ohio,

wherein David Austen et al. are plaintiffs, and Henry Miller is defendant, which suit is now pending. L. V. Dixon, of lawful age, being first duly cautioned and solemnly sworn, *and* saith to the first direct interrogatory:

Answer to 1st interrogatory: I did reside in Hinds county, Mississippi, in the year 1840, and acted as notary public, by virtue of my character of justice of the peace, and by the authority of the laws of the State of Mississippi.

Answer to interrogatory 2d: I did protest a certificate of deposite, issued by the Mississippi Union Bank, and I believe the copy contained in this interrogatory to be correctly copied. I presented said certificate and demanded payment for the holder upon the 4th day of May, 1840, at the teller's counter, in the banking house of said bank, in the city of Jackson; W. T. Wynn, was the teller, but he, before he refused payment, consulted the other officers of the bank; the reply was, that it would be paid in the notes of said bank, but not in specie or its equivalent, which was demanded.

Answer to interrogatory 3d: The presentment and demand was made by me, the refusal thereof duly noted, and notice directed to Henry Miller, and to the other endorsers, to the best of my recollection; there was certainly more than one notice sent, but I have now no other means of ascertaining than from recollection, my book having been stolen or destroyed by some interested persons in the other matters of record it contained. The notice to Miller is fresh in my memory; it was a printed blank, filled up to correspond with the facts, and directed to him at Cincinnati, Ohio, and mailed in the post office in this city, in time to go out by the first mail of the next day after the protest.

Answer to first cross interrogatory:

The presentation of said certificate was made in banking-house, but the precise time of day I do not remember. While I was in bank I was called upon by another person to present for payment several thousand dollars of the notes of said bank, which I did, the bank by its acts in this relation showing that it was within the banking hours. Payment of said certificate was tendered to me in the notes of said Mississippi Union Bank. I do not remember what was said about the kind of funds [which] formed the basis of said certificate; there was a conversation carried on behind the counter, between the teller and the other officers of the bank, but I did not hear it, although it was within my sight. I have, in a former part of this deposition, stated as concisely as I could the day and time of day. When I received it [I] do not remember. I had the original certificate when the presentment and demand was made, or I should not have gone to bank to demand the amount. I cannot now say who claimed to own it, but refer to my certificate of protest, which must be of record in this suit, for any facts I have not fully stated. I was "justice of the peace for the Jackson beat," Hinds county, Mississippi. The demand was made in person, J. Ps. having no deputies in Mississippi.

Answer to second cross interrogatory:

I did give notice to Henry Miller, as I before stated, by letter, partly in print and partly in writing. I cannot give a copy, not having the original. The notice, however, contained such matters as I deemed sufficient to convey to any sensible man the fact that he was looked to for payment, as endorser, in consequence of the failure of the bank to take up said certificate. I put the notice directed to Henry Miller in the post office in Jackson, addressed to him at Cincinnati, Ohio. There was not personal service upon him of the notice. It was a separate piece of paper, and not contained in an envelope. The notice was signed L. V. Dixon, as notary public, &c., and was mailed by me, by putting it in the post office in Jackson, as aforesaid.

L. V. DIXON.

And George L. Potter, a practising lawyer, being called, cautioned, and sworn, as in the preamble, states and swears as follows. To the first interrogatory he answers:

Answer to interrogatory first:

I am a practising lawyer in said State of Mississippi, and such have been for nine years or more.

Answer to second interrogatory:

By the statute law of Mississippi justices of the peace are ex officio notaries public, and all acts of a notarial character done by them are by statute to receive the same credit and legal import as are attached to the acts of notaries public within the United States. Said statute took effect, under the Constitution, sixty days after the 26th February, 1836, as appears by reference to the printed statutes. Said act was in force during the year 1840, and still is the law.

GEORGE L. POTTER.

I, John P. Oldham, a justice of the peace in and for Hinds county, and State of Mississippi, do hereby certify, that L. V. Dixon and George L. Potter were by me severally sworn to testify the truth, the whole truth, and nothing but the truth; and that the depositions by them respectively subscribed were reduced to writing by themselves, respectively, and were taken at the time and place in the preamble stated. And I further certify, that I am not of counsel to either party, or to any of the parties, to said suit, or in any way interested in the event thereof.

J. P. OLDHAM, *J. P.* [L. S.]

Fee for taking depositions, $3, paid by plaintiffs.

To the introduction of which certificate in evidence the defendant objected, because the said paper was not a negotiable instrument; also because it was not authorized to be issued by the charter incorporating the Mississippi Union Bank; also because it was not shown that the said George Lockwood, under whom the plaintiffs claim, was a resident of any other State than the State of Ohio, at the time he endorsed the paper, or at the time this suit was brought; also because the endorsement of said George Lockwood was not proved. He also objected to

the introduction of said protest and deposition, because the same did not show a valid presentment for payment, and refusal thereof, and notice to the defendant of the non-payment thereof.

But the court overruled each and all of the above objections, and admitted all and each of said papers in evidence; to which overruling of said motion, and admitting said testimony, the said defendant, by his counsel, excepts, and prays that this, his exception, may be signed and sealed; which is done.

And thereupon the said plaintiffs' said certificate of deposite, protest, and deposition, which was all the evidence given in the cause by the plaintiffs, and none was offered by the defendant; and thereupon the counsel for the defendant asked the court to charge the jury as follows:

1st. That the paper offered in evidence is not a negotiable instrument under the laws of Ohio, and cannot be sued on by the plaintiffs in the cause.

2d. That the Mississippi Union Bank was not authorized to issue the paper offered in evidence, and that, therefore, the plaintiffs cannot recover.

3d. That the plaintiffs cannot recover of the defendant, on this paper, without proving that George Lockwood, the first endorser, could have sustained the action by being a resident of the State of New York, or other State not Ohio, at the time the paper was endorsed by the defendant, Miller, to him.

4th. That the deposition of L. V. Dixon, and the certificate of protest, does not show a sufficient presentment, demand, and protest, and notice thereof to the defendant, of the non-payment of said certificate of deposit, to charge the defendant as endorser.

6th. That said paper offered in evidence is not a promissory note, nor is it a bill of exchange, but is a mere certificate, acknowledging the receipt and deposit of paper or obligations of some kind, which are payable twelve months after 1st May, 1839, bearing interest at the rate of five per cent. till due.

7th. That no interest is recoverable; but, if any can be recovered, that only five per cent. interest can be charged on the paper.

But the court refused to give this charge; and, at plaintiffs' request, charged the jury the plantiffs were entitled to interest at rate of five per cent. from the 8th February, 1840, to 1st May ensuing, and at the rate of six per cent., on fifteen hundred dollars, from the 1st May, 1840, to the present time.

All and each of which charges the court refused to give as asked.

To which refusal to give the instructions and charges, as asked, and to the charge as actually given, the defendant, by his counsel, excepts, and prays that this, his exception, may be signed, sealed, and allowed, which is done.

JOHN McLEAN. [L. S.]

And thereupon, on the twenty-fifth day of October, in the year and at the term of said court first herein mentioned, " comes the defendant,

by his attorney; and moves the court for an allowance of a writ of error; which motion is granted, on the defendant entering into bond to the pl'ff, in the sum of three thousand dollars, with such security as shall be approved by the clerk of this court."

The United States of America, district of Ohio.

I, William Miner, clerk of the circuit court of the United States, for the district of Ohio, do hereby certify, that the foregoing is a true copy of the record of the proceedings had in a cause determined in said court, in which David Austen, William S. Wilmerding, and David Austen, jr., partners, &c., were plaintiffs, and Henry Miller, defendant, as the same appears on the records of said court, in my office."

In testimony whereof I have hereunto subscribed my name, and affixed the seal of the said circuit court, at the city of Co-
[L. S.] lumbus, this first day of November, in the year of our Lord one thousand eight hundred and fifty, and of the independence of the United States of America the seventy-fifth.

WM. MINER, *Clerk.*

And the said Henry Miller, plaintiff in error, comes and says that in the record and proceedings aforesaid, and in the judgment rendered aforesaid, there is manifest error to his prejudice, in this, to wit:

Because the court erred in admitting evidence to the jury, viz., the paper A, dated 8th Feb., 1840, signed Wm. P. Grayson, cashier; also the protest dated 4th May, 1840, signed L. O. Dixon, paper B; and the deposition of L. O. Dixon, C.

Also, because the court erred in refusing to charge the jury, as requested by the said Henry Miller, as per seven charges requested, numbered from one to seven.

Also, because the court erred in charging the jury that the plaintiffs below were entitled to recover six per cent. interest from the first of May, 1840.

Also, because said court gave judgment in favor of said plaintiffs below, when they ought to have rendered judgment for the defendant below.

For these and other errors in said record contained, the said plaintiff prays that said judgment may be reversed and held for nought.

CHARLES FOX,
Att'y for pl'ff in error.